FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 8 1977
MICHAEL RODAK, JR., CLERK

No. 75-1443

In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Both respondent (Br. 13-14, 18-20) and *amicus* (Br. 5-20) contend that Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g), affirmatively grants the federal district courts jurisdiction to entertain suits to review the Secretary's refusal to reopen final administrative decisions.

a. In relying upon Section 205(g), respondent candidly admits being "at odds" with the case law (Br. 13).[1] As respondent acknowledges (Br. 13), the courts of appeals

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[1]All of the numerous courts of appeals that have passed upon this issue have agreed that jurisdiction over the Secretary's denials of reopening petitions cannot be based on the Social Security Act. See p. 16 of our opening brief. The court below subscribed fully to that proposition and thought it too clear for argument (Pet. App. A, p. 5a).

are in agreement "that Section 205(g) is not the jurisdictional basis for * * * review because the literal requirements of a 'final decision made after a hearing' are absent * * *." But, respondent argues, in *Weinberger* v. *Salfi*, 422 U.S. 749, and *Mathews* v. *Eldridge*, 424 U.S. 319, this Court discarded the statute's literal requirements. Similarly, *amicus* argues (Br. 5-10) that the requirement of a "final decision after a hearing" has in practical effect been erased. Both positions fly in the face of the plain statutory language and find no support in the cases relied upon.

In *Salfi* and *Eldridge*, the substantive questions presented for review concerned the constitutional validity of standards and procedures imposed by the Social Security Act. Questions of that type are unsuited to determination through administrative hearing procedures, and this Court held that in such special circumstances the requirement of a hearing could be waived. But in the ordinary case, and this is one, involving nothing more than the application of an unchallenged statutory or regulatory standard to the evidence of record, the statutory requirement of a "final decision made after a hearing," together with the 60-day statute of limitations, serves the important function of weeding out both stale and premature claims. As a matter of judicial economy it should not be ignored, and as a matter of statutory construction it cannot be.

To ignore the required statutory procedure in cases such as this would frustrate the congressional purpose implicit in the 60-day statute of limitations. If a broad scope of review were exercised over denial of reopening, by the simple expedient of requesting reopening a claimant could in effect restart the running of his 60 days. Respondent suggests that upon review of a refusal to reopen, a claimant would be entitled only to "limited review," which will be undertaken for "the limited purpose of ascertaining error on the face of the

evidence" (Br. 19).[2] But respondent does not explain how such review would differ from a review of the Secretary's final decision denying benefits, where the question is whether the findings are supported by substantial evidence. Acceptance of respondent's position, therefore, might create a second entry path to the courts to review the merits of the original claim for benefits, one without any guide as to procedure or limits as to time.

b. Respondent alternatively contends (Br. 13-14; see also *Amicus* Br. 10-20) that a petition for reopening presents an application "for payment under" the Social Security Act and therefore requires both a hearing within the meaning of Section 205(b) and judicial consideration under Section 205(g). But Section 205(b) does not mandate a hearing on the mere filing of an application for payment. Rather, it calls for a hearing, after preliminary review and a timely appeal therefrom, "to make findings of fact and decisions as to the rights of" the applicant. Once the Secretary has complied by making the factual determination and thereupon rendering a decision as to the rights of the individual—his final decision made after a hearing—he is not required to do it again, upon a request for rehearing or reopening.[3]

The contrary view urged by respondent and *amicus* would impose upon the Secretary the burden of conducting a potentially endless series of hearings with regard to each claimant, and upon the courts the correlative burden of hearing a potentially endless series of actions.[4] The cost to

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[2]In the present case, we are not informed what kind of error respondent alleges.

[3]Indeed, the statute itself does not provide any reopening procedure—the opportunity to reopen final decisions is afforded by the Secretary's regulations—and therefore Congress plainly did not contemplate a hearing requirement with respect to such procedure.

[4]Alternatively, the Secretary would be forced to revoke his regulations establishing a procedure for reopening.

society in potential disruption of both the agency's and the courts' administration would far outweigh the benefit in arguably more informed decision-making with respect to requests for reopening. Cf. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 348. Respondent and *amicus* cite no case law or legislative history that directly supports their novel theory, and neither the language nor the purpose of Section 205(b) will sustain the reading they urge.

2. Respondent contends (Br. 3-12; see also *Amicus* Br. 21-27) that even if jurisdiction is not affirmatively granted by Section 205(g), it is not precluded by Section 205(h).[5] But as written, and as this Court has interpreted its words, Section 205(h) means that only those decisions of the Secretary that satisfy the requisites of Section 205(g) are eligible for court review; all others are precluded. The second sentence of Section 205(h) explicitly states that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided," *i.e.*, except as provided in Section 205(g). This Court has confirmed that this provision "prevent[s] review of decisions of the Secretary save as provided in * * * §[2]05(g)." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757. Since it is not controverted that respondent seeks review of a "decision of the Secretary," it is manifest that his suit is barred by the second sentence of Section 205(h) if, as we have argued, it is not cognizable under Section 205(g).

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[5]Of course, even if there is not a total preclusion of jurisdiction there still must exist a specific source of jurisdictional authority or the federal courts cannot act in the case. Although some courts have upheld jurisdiction in cases like this without discussing its basis, they doubtless were relying on one or another of the statutes invoked here. For that reason, we do not linger over respondent's invocation of the "inherent power" (Br. 14-18) of the district court to take jurisdiction in this type of case.

Following *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (C.A. 2), respondent and *amicus* suggest that the language quoted above from Section 205(h) should be read as applying only to those findings and decisions of the Secretary with respect to which jurisdiction to review is conferred by Section 205(g), *i.e.*, as precluding nonstatutory review only of final decisions made after a hearing, with respect to which statutory review already is provided. But that argument runs counter to both the plain statutory language, which covers not just final decisions but all findings and decisions of the Secretary, and common sense as well. For example, Congress could not have intended by one and the same provision both to restrict the courts' jurisdiction over the Secretary's final decisions and at the same time to open up to unfettered judicial congnizance the Secretary's interim decisions, made before a hearing. To the contrary, Congress intended to, and did, bar court intervention in all the Secretary's decisions that did not fall within the particular provisions in favor of final decisions made after a hearing.

Amicus suggests (Br. 25) that the *Cappadora* reading nevertheless is required to prevent the second sentence of Section 205(h), quoted above, from making the third sentence redundant. (The third sentence reads: "No action against the United States, the Secretary, or an officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.") There is no danger of redundancy. Whereas the second sentence of Section 205(h) pertains only to the review of findings of fact or decisions of the Secretary, the third sentence sweeps broadly to bar suits where the Secretary has not yet acted or no administrative claim has been filed. *Amicus* simply overlooks the entire thrust of Section 205(h): the third sentence forces the claimant to pursue his

administrative remedies, and the second sentence forces him to exhaust those remedies, before a suit on his claim becomes judicially cognizable.[6]

3. Our contention that Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, does not itself confer jurisdiction on the district courts[7] received after-the-fact confirmation with the enactment on October 21, 1976, of Pub. L. 94-574, 90 Stat. 2721.[8] That statute abolishes the

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[6]Since the second sentence of Section 205(h), pertaining to situations such as here where the Secretary has made findings of fact or a decision, explicitly bars review of this case, the Court need not reach *amicus'* contention (Br. 22-23) that the third sentence of Section 205(h), standing alone, would not preclude jurisdiction under statutes other than those comprehended within 28 U.S.C. (1946 ed.) 41. That contention is relevant only to situations where the second sentence does not apply, *i.e.*, to situations where suit is brought without awaiting a finding or decision by the Secretary. It is not relevant here. In any event, *amicus'* contention fails for the reasons stated at pages 12-16 of our opening brief and at pages 17-18 of the Secretary's brief in *Norton* v. *Mathews*, No. 74-6212, decided June 29, 1976. (We are furnishing respondent with a copy of the latter brief.)

[7]Of course, the Court need not reach this issue if it concludes, as we contend, that Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen. See 5 U.S.C. 701(a)(1).

[8]Pub. L. 94-574 is reprinted in the Appendix, *infra*. A main provision of that statute eliminates the defense of sovereign immunity in suits against the United States involving agency action and seeking relief other than money damages. This is done by an amendment to Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, but the amendment makes clear that the removal of the immunity defense does not displace statutes that otherwise bar the review of particular agency action: "Nothing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The legislative history of Pub. L. 94-574 also makes clear that other "legal or equitable" grounds of defense to suits challenging agency action are left intact, including the grounds that the "action [was] committed to agency discretion," and that there was "express or implied preclusion of judicial review * * *." S. Rep. No. 94-996, 94th Cong., 2d Sess. 11 (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12 (1976).

amount-in-controversy limitation of 28 U.S.C. 1331 in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Since the amount-in-controversy requirement had not served to deprive the district courts of jurisdiction to hear ordinary money claims against the United States in cases involving less than $10,000 (see 28 U.S.C. 1346(a)), the manifest purpose of Pub. L. 94-574 is to enlarge jurisdiction to hear suits, not cognizable as money claims against the United States, arising out of administrative decision making, *i.e.*, to enlarge jurisdiction to review agency action. The legislative history confirms this. Enactment was motivated by the consideration that "[t]he amount in controversy requirement in subsection (a) of section 1331 of title 28 prevents an otherwise competent United States district court from hearing certain cases seeking 'non-statutory' review of Federal administrative action." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 13. (1976). See also S. Rep. No. 94-996, 94th Cong., 2d Sess. 12 (1976).

If, as respondent argues, the APA itself confers jurisdiction to review agency action, the new statute would have been largely or entirely unnecessary. But Congress clearly was of the view that it had not conferred jurisdiction in the APA. Congress acted because "there are a significant number of situations involving 'nonstatutory' review in which a plaintiff must still ground his action on Section 1331 * * *." S. Rep. No. 94-996, *supra*, at 13; H.R. Rep. No. 94-1656, *supra*, at 14.

Undoubtedly, the chief reason why some courts have allowed themselves to be persuaded that the APA affords an independent basis for jurisdiction has been the effect of the $10,000 amount-in-controversy requirement in 28 U.S.C. 1331. Individuals seeking to vindicate rights against agencies or other government officials when those rights carried no dollar-and-cents valuation long pressed the

courts to read the APA as a jurisdictional statute because it contains no amount-in-controversy limitation on jurisdiction. In Pub. L. 94-574, Congress has afforded relief to such individuals, but in a manner that leaves no doubt of its disapproval of prior judicial decisions "avoiding or circumventing" the former jurisdictional bar. See S. Rep. No. 94-996, *supra*, at 16; H.R. Rep. No. 94-1656, *supra*, at 16-17. "Such avoidance," both Committees noted, "abdicates a court's constitutional and statutory duties 'to insure that each case before it falls within the limited jurisdictional power of the federal judiciary * * *'." *Id.* at n. 51.

Thus Pub. L. 94-574 and its legislative history establish beyond serious doubt that Congress regards 28 U.S.C. 1331, not the APA, as the jurisdictional provision governing nonstatutory judicial review of agency action.[9] Since Section 205(h) of the Social Security Act explicitly bars consideration of social security claims under 28 U.S.C. 1331 (see pages 5-6 and note 6, *supra*), the courts lack jurisdiction to grant such review here.

For the reasons stated above and in our opeing brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[9]In addition, actions of certain agencies have been held to be reviewable under 28 U.S.C. 1337, which confers jurisdiction on the district courts over civil actions arising from commerce and antitrust regulations.

DOJ-1977-01

APPENDIX

Public Law 94-574
94th Congress

90 STAT. 2721

An Act

To amend chapter 7, title 5, United States Code, with respect to procedure for judicial review of certain administrative agency action, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 702 and 703 of title 5, United States Code, are amended to read as follows:

"§ 702. Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

"§ 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement".

SEC. 2. Section 1331(a) of title 28, United States Code, is amended by striking the final period and inserting a comma and adding thereafter the following: "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

SEC. 3. The first paragraph of section 1391(e) of title 28, United States Code, is amended to read as follows:

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.".

Approved October 21, 1976.